No. 17-532

IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING SHERIDAN COUNTY

BRIEF FOR CITIZEN EQUAL RIGHTS FOUNDATION (CERF), MILLE LACS EQUAL RIGHTS FOUNDATION (MERF) AND THE CITY OF WAKHON, MINNESOTA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Mille Lacs Equal Rights Foundation ("MERF") is a member organization of CERA and is incorporated as a non-profit in Minnesota. Current members of MERF brought the Mille Lacs treaty case, *Mille Lacs Band of Chippewa Indians v. State of Minn.* ("*Mille Lacs*"), 526 U.S. 172 (1999), to the attention of CERA in 1997. The City of Wahkon is on the southeastern shore of Mille Lacs Lake and has been directly affected by the Court's decision in *Mille Lacs*. After the decision in *Mille Lacs*, the State of Minnesota's stipulation agreement and protocols with the Mille Lacs Band effectively removed input from local residents, towns, the county and non-Band members in the rule-making procedures and process for management and use of the lake and its resources. CERF, MERF and the City of Wahkon are primarily writing this *amici curiae* brief to explain why federally reserved treaty interests must be limited by the structure of the Constitution as a matter of federalism to protect the individual rights of the people to self-governance at both the state and national level.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other

Amici submits this *amici curiae* brief in this case to explain how this Court can apply political accountability federalism as recently adopted in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018) to limit the reach of the federal reserved treaty rights. Both Petitioner Herrera and the State of Wyoming have filed blanket consents to the filing of this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

Petitioner Herrera is trying to convince this Court that the *Mille Lacs* Treaty case has implicitly overruled the decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). Amici are writing to explain the effect of the treaty decision in Minnesota and prevent this Court from furthering the erroneous belief that federal reserved interests created before statehood can be balanced with state interests to create workable cooperative management that does not displace primary state jurisdiction over the managed resource. Since the Court's decision in *Mille Lacs*, meeting reports, technical data, communications and rule-making procedures regarding resource management of Mille Lacs Lake have been exclusively between Minnesota Department of Natural Resources and 1837 Ceded Territories Fisheries Committee and closed off to input from persons not a part of the applicable Chippewa Bands. *See* Stipulation, Civil No. 3-94-1226 (D. Minn. 1996), available at

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than *amici curiae*, CERF, its members or its parent CERA's members including Mille Lacs Equal Rights Foundation and the City of Wahkon, or its counsel have made any monetary contribution to the preparation or submission of this brief.

https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/stipulation.pdf; *see also* Ex. D-1, Protocol #1: Minnesota 1837 Ceded Territories Fisheries Committee, available at https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/_court_decision/exhibit_d1.pdf. Local governments, businesses that rely on the lake, and local residents that are not tribal members effectively have no voice in the management of the lake.

Petitioner Herrera attempts to argue the *Mille Lacs* case impliedly overrules the decisions in *Crow Tribe v. Repsis*, 116 S. Ct. 1851 (1996) and *Ward v. Race Horse*, 163 U.S. 504 (1896) to challenge his poaching conviction in Wyoming. Amici write this brief to explain that any extension of the reserved rights doctrine against a state after statehood, even when incorporated in a treaty, improperly displaces the primary jurisdiction of the state.

CERA, not understanding why this result was occurring in every case where cooperative management was ordered by this Court, increased its research on the underlying basis of the reserved rights doctrine. *See generally Sturgeon v. Frost*, 136 S. Ct. 1061 (2016). CERA focused on the work of William H. Veeder because he was the primary architect of the major reserved rights water cases in the West, most notably *Arizona v. California*, 373 U.S. 546 (1963). That research has led to documents that demonstrate how and why the reserved rights doctrine cannot be limited by any court. Most recently, CERF submitted a 1930 Federal Irrigation Water Rights Memorandum attached to its amici brief on the already argued case of *Sturgeon v. Frost II*, Docket No. 17-949 to prove this assertion. Amici will explain to this Court how allowing Congress plenary authority over the Indians in *United*

States v. Kagama, 118 U.S. 375 (1886) expanded federal rights reserved to the Indian tribes in treaties before statehood to being perpetually enforceable under the federal reserved rights doctrine. *See United States v. Winans*, 198 U.S. 371 (1906). From this, attorneys for the Department of Justice ("DOJ") created the federal reserved water rights doctrine to challenge the public trust doctrine set in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845). *See Winters v. United States*, 207 U.S. 564 (1908).

Amici will attempt to apply the political accountability federalism argument used in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to convince this Court that *Ward v. Race Horse* and *Repsis* apply to decide this case. The Court should uphold the *Ward v. Race Horse* precedent that protects the constitutional structure of federalism. This Court took a huge step toward restoring federalism in *Murphy v. NCAA* this past term. Justice Alito, in writing the opinion of the Court, opined that the doctrine of federalism is contradicted by granting Congress plenary authority. Amici agree. The reservation of federal rights in Indian treaties must end at statehood. Accordingly, the Court should uphold the decision of the Tenth Circuit Court of Appeals affirming Wyoming's conviction of Petitioner Herrera.

ARGUMENT

Amici appreciate this Court in *Mille Lacs* attempted to create a balanced decision to protect the reserved interests of the Indian tribes under the treaties negotiated with the United States before statehood, while also protecting the real property and justifiable expectations of the non-Chippewa residents,

local governments and users of the lake. In 1997, CERA, just like this Court, believed that a balance of state and federal interests could be found that would allow state agencies to cooperatively work with federal entities without compromising fundamental state authority. As foreshadowed by Justice Thomas in his dissent in *Mille Lacs*, however, the Court underestimated the federal influence that would be exerted over Minnesota's sovereign authority to manage its natural resources when it acknowledged the treaty interests may have granted "the Chippewa the right to hunt, fish and gather in the ceded territory free of territorial, and later state regulation." 526 U.S. at 1212. Indeed, the continuing stipulation and protocols between Minnesota and the Mille Lacs Band are influenced by the Court's dicta "curtail[ing] the State's ability to regulate hunting, fishing and gathering by the Chippewa in the ceded territories," and have effectively excluded Minnesota's non-Band citizens and local governments from the rule-making procedures and processes involving resource management on the ceded lands. As in *Mille Lacs* and this case, judicial attempts at balanced cooperation have become dominated by federal interests. This case presents the opportunity to correct the *Mille Lacs* decision that assumed reserved federal treaty rights for tribes could be cooperatively managed by state and federal agencies without displacing state sovereignty.

I. INDIAN TREATIES RESERVE RIGHTS THAT BELONGED TO THE UNITED STATES BEFORE STATEHOOD.

A. Background for United States Treaties with the Indian Tribes.

The main reason the nascent United States began to make treaties with the Indian tribes was that Great Britain and the other European countries had begun the practice of making treaties with aboriginal natives as the means to legally justify claiming possession of newly discovered land. These treaties offered proof of seemingly just intentions to the ecclesiastical entities that were after "converting" the natives to Christianity. The actions taken by Spain and the Catholic Church in converting Indians to Christianity were brutal and often amounted to genocide. To Great Britain's credit, its treaty agreements did not require overt promises of conversion to gain protections of the Crown. At the time, these treaties were deemed as being beneficial to the Indians because they were to be "civilized." Conversion to Christianity was one part of being made "civilized." To Britain, the major interest in making treaties with the Indians was to stop their hunting and gathering practices and settle them in a specific limited area where they would learn to farm and grow their own animals, and thus free the extensive lands for settlement by non-Indians.

Finding actual legal citations to this very blunt description for the reason why the United States made treaties with the Indians is not easy. Early cases describe the treaties as beneficial to the Indians and assume imposing European customs was necessary.

Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831). The perspective of the Indians was never addressed. Even in the 1830's, Chief Justice Marshall applies principles of European law to counter what the Congress had done with the Removal Act of 1830, 4 Stat. 411, but ignores the perspective of the Cherokee Nation. It was not until the United States confronted the "civilized" Indian tribes called Pueblo Indians, as recognized in the international peace treaty of Guadalupe Hidalgo, that the real racial prejudice and belief of cultural superiority were made clear in *United States v. Sandoval*, 231 U.S. 28, 39 (1913). The United States finally admitted the real purpose of the Indian treaties and federal Indian policy was to gain title to the land. *United States v. Candelaria*, 271 U.S. 432, 439 (1926).

Indian treaties were also the first mechanism created for reserving important locations of land and mineral lands. Great Britain attempted to reserve important water routes and valuable lands through Indian treaties negotiated for the benefit of aristocratic officers willing to help fund colonization. Chief Justice Marshall masterfully dealt with the Indian title problem this created in *Johnson v. McIntosh*, 21 U.S. 521 (1821), successfully altering the controlling sovereignty from Britain to the United States. Because the United States essentially retained the British legal system, all that was possible was to attempt to adapt the old legal principles into the new American political system. The British system was based on one centralized government that had forced the quasi sovereign governments of Wales and Scotland to cede their traditional powers. It was contrary to the deliberate split of sovereignty incorporated into the Articles of Confederation and the then new Constitution. The issue of whether the States or the

national government had control over the Indian tribes within their borders immediately became a major point of contention with the Declaration of Independence.

To summarize, the Articles of Confederation favored state sovereignty over a centralized national government giving great control over the Indian tribes to the States. The Constitution substantially altered this to give the national government primary authority over the Indian tribes. The treaties and agreements made between States and tribes under the Articles were validated and enforced as preexisting the Constitution. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203-204 Footnote 1(2005). With the adoption of the Constitution, the United States asserted exclusive authority to make treaties with the Indian tribes. Many of these early treaties completely ignored and even contradicted previously-made State treaties and agreements with Indian tribes under the Articles of Confederation in the original thirteen States. As will be discussed in the next section of this brief, the United States still claims to assert the reserved treaty interests of the original States using the very same reasoning it uses for displacing the public trust doctrine that reserved the bed and banks of rivers to the States.

Most of the Indian treaties, including the ones directly relevant to this case, were negotiated between the United States and the Indian tribes in the newly acquired territories after the adoption of the Constitution before the new territory was formed into states. Treaties with the Indian tribes were used to validate the release of Indian title in the same way Great Britain had used the treaties. The young United States used these Indian treaties to cede land to the national government and start the public land process

to encourage settlement. The public lands process was formalized in the Northwest Ordinance of 1787 adopted as the Northwest Ordinance of 1789 as one of the first acts of the first Congress. This process defined how territorial land was opened for settlement and then made into a new State. The Court followed this process in its decision defining the equal footing doctrine as a matter of separation of powers in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and other old water cases.

Amici fully admit the making of a treaty with an Indian tribe in a territory of the United States was allowed under the Constitution. Negotiating the cessions of land for confirmed rights to continue hunting and fishing across public lands of the United States while an area was a federal territory was well within the authority of Congress and the Executive Branch. Guaranteeing specific reservations of public land to be withdrawn from sale and reserved for Indian tribal use in a federal territory was similarly acceptable. However, when a territory became a State, the State was supposed to assume primary jurisdiction over its territory. Prior to the Civil War, if a sovereignty dispute arose, the dispute was resolved by applying the equal footing doctrine. Federal Indian treaties negotiated in federal territories were enforceable against the United States, but not against a State after statehood. *Ward v. Race Horse*, 163 U.S. 504 (1896). Reserved federal lands for Indian tribes were held in a continuing temporary basis after statehood but were subject to concurrent state jurisdiction.

This law was complicated by the major dispute that arose between the Supreme Court and the elected branches over the Removal Act of 1830. Chief Justice Marshall, a renowned proponent of a strong national government, strongly disagreed with President

Andrew Jackson, a renowned populist, over resolving the conflicting federal and state interests over the Indian tribes in the original thirteen colonies. The Removal Act of 1830, with the 1834 revision to the Trade and Intercourse Act, were the elected branches solution to resolve the dispute by removing Indians to west of the Mississippi River that wished to retain tribal relations and then relinquishing all federal interests and trust responsibilities to the Indians that chose to remain in the East.

General judicial equity power to overrule the Removal Act as unconstitutional was initially rejected in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Chief Justice Marshall refused to exercise judicial review to overturn the denial of an injunction then-sought to preserve the Cherokee Nation's treaty right to occupy territory within the State of Georgia over which the United States's asserted title, as decided in *Johnson v. M'Intosh*, 21 U.S. 571 (1823). Granting the injunction would potentially be tantamount to recognizing "the existence of nations and States [...] possessing [aboriginal] dominion and jurisdiction *paramount to* the Federal and State Constitutions" (emphasis added) 30 U.S. at 49-50. The Court's general judicial equity power was, thereafter, first created in *Worcester v. Georgia*, 31 U.S. 520 (1832). In apparent deference to Justice Johnson's earlier dissent in *Cherokee Nation*, 30 U.S. at 69-70, Chief Justice Marshall proceeded to deliberately oppose the elected branches of government and to declare a federal trust relationship with the Cherokee Nation. Amici is not going to get involved in discussing the Removal policy of 1830 or what led Chief Justice Marshall to make such a bold step. Amici are interested in what this judicially-declared federal Indian trust relationship has become according to the

federal attorneys who manufactured the federal reserved rights doctrine.

The *Worcester* opinion adopted the concepts of protection and trusteeship as more than "a mere moral responsibility." Chief Justice Marshall applied the law of nations as explained in the treatise of contemporary international law expert Emer de Vattel ("Vattel").[2] *See also United States v. Rogers*, 45 U.S. 567, 572 (1846) (referring to them as in "the spirit of humanity and justice"). In *Worcester*, this Court exercised its equity powers to acknowledge such responsibility as having been fulfilled previously by the British Crown in North America, and as having been thereafter inherited and assumed, initially, by the American colonies in the context of "defensive war," and ultimately, by the newly formed United States government following the Revolutionary War. *Worcester*, 31 U.S. at 543-551. Indeed, in *Worcester*, this Court cited Vattel's treatise as the basis for concluding that Indian tribes or bands could be considered 'sovereign' nations or states able to enter into enforceable treaties with independent sovereigns, so long as they retained one facet of sovereignty – political and administrative self-governance. *Rogers*, 45 U.S. at 572; Vattel at 349-354. This Court construed these indicia as evidencing the dependent 'ward' status of the tribal nations to the United States.

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[2] *See* Emir de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Lieber Collection (Philadelphia: T. & J.W. Johnson, Law Booksellers (1844)); Emir de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008).

This Court made law in *Worcester v. Georgia* that completely separates the Indians from the rule of law established under the Constitution. In exercising its equity powers to adopt an Indian trust standard based on the law of nations, this Court created and maintains the ultimate right of deciding how to interpret the federal trust relationship with the Indians and tribes. The *Worcester* Court found that Indian treaties executed by the United States are "the supreme law of the land" (Art. VI, Cl. 2), thus intentionally limiting federalism for the benefit of the Indian tribes. This Court in *Worcester* classified the status of the ground occupied by the Cherokee Nation in Georgia as federal Indian country, breaking written safeguards imposed in the Constitution and by statute under domestic law to prevent the war powers from being applied generally against the States and the people.

President Jackson refused to apply the *Worcester* decision and proceeded to treat the lands set aside in Georgia by Indian treaty with the Cherokee Nation as subject to the Removal Act creating the famous Trail of Tears. President Jackson placed the interests of the States and local people over the interests of the Indian tribes in refusing the extra-constitutional trust relationship of *Worcester*. Another way to characterize the position of President Jackson was that the Removal Act was the written policy of Congress and it dominated the Indian treaty made by the United States with the Cherokee Nation despite the ruling in *Worcester*. The pre-Civil War case of *Worcester v. Georgia* laid the groundwork to potentially authorize further federal government activities to displace constitutionally-protected private property rights and State processes in favor of the aboriginal

rights of the Indian tribes as designated in treaties with the United States. [3]

B. The 1871 Indian Policy Ended Treaty Making, but Created Direct Federal Reserved Rights.

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes but preserved the tribal interests made in the Indian treaties. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. *See* 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. As inherited from the laws of Great Britain, the war powers displace all civil law under the assumption that they are being invoked in a public emergency. The overriding need to protect the physical

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[3] *See e.g., Baley v. United States*, 1-591-L (Fed. Cl. 2017), slip op. at 2, 16-17, 19-21, 45-46, 60-65, 70-74; The Kogan Law Group, P.C., *Summary of Write-ups for Western States Constitutional Rights, LLC* (2016).

integrity of the land and people in a war was necessary to ultimately preserve the very existence of the nation. In other words, invoking the virtually unlimited war powers to fight the Civil War comported with the use of the war powers under British law.

Deliberately preserving the war powers in the 1871 Indian policy when the Civil War ended signaled a major change from what the Framers had tried to design into the constitutional structure to create a new way way to settle land. The Framers were the victims of the territorial war powers of Britain. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era. The new system was designed to encourage human progress through self-government and giving everyone the benefit of their own labor. It was far from perfect, as it was the first attempt to overcome the imperialism policy of Great Britain and the other European nations, but the assimilation or "melting pot" ideal – that all persons could succeed if they applied their talents and labor in what we call the "American dream" – was born in the structure of the Constitution that separates the powers of the national government and reserves powers not delegated to the federal government to the States. Part of this structural component was that new States had to be created from any territorial lands, which prevented the national government from concentrating its power to usurp the rights of the People in the states. This structural component was designed to keep law-making as local as could be engineered.

For example, in a modern computer, the main processors are divided into multiple cores. Having multiple processing cores allows the system to access information faster and from different data sources

within the system, which produces a more complete answer that allows the user the full available information to control the system. The States work the same way in the constitutional structure. The constitutional system was intentionally designed to encourage the formation of state and local governments and keep law-making as close to the people, who are the actual data users and controllers, as possible, rather than allotting greater power to the more removed and singular federal government. This means that, when the United States promotes the tribal trust relationship, it is asserting an overriding national interest to short out the constitutional structure that routed the power to the people. The public land process of making territories into States was the linchpin of the constitutional structure to preserve self-governance.

With the adoption of the 1871 Indian policy, the Indians were segregated from the rights of other Americans. Before the 1871 Indian policy, if an Indian left their tribe and chose to live as a non-Indian, they were eligible for all of the rights of any American. They could own private property and participate in their community. After the 1871 Indian policy, even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only the federal government could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884). This made the federal power over the Indian tribes perpetual.

In *United States v. Kagama*, 118 U.S. 375, 380 (1886) this Court knew the plenary power was actually the acquiescing of this Court to allow 1871 Indian war

powers to commingle the enumerated federal powers of the Constitution. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." *Kagama* at 384. In one statement, the extra-constitutional ruling in *Worcester* was integrated with the 1871 Indian war powers preserved from the Civil War to create plenary power over Indian Affairs. With the decision in *Kagama*, the war powers became directly attached to federal Indian policy, making the as-memorialized interests asserted by the United States on behalf of the Indians in Indian treaties enforceable over structural constitutional safeguards. This meant the Indian treaties could continue in force after statehood and interfere with the equal footing rights of recently admitted States. This was the very issue confronted by this Court in *Ward v. Race Horse*, 163 U.S. 504 (1896).

In *Ward v. Race Horse*, this Court was confronted with whether Indian treaty rights continued after Statehood to prevent the laws of the State against poaching to applying to the accused Native American. In *Ward*, the Court began its analysis by keying on the words in the treaty that it only applied to "unoccupied lands of the United States." *Ward* at 507-508. The Court explained how the treaty language of setting up hunting districts was intended to limit the right to hunt to preserve the peace as white settlement occurred. The Court then proceeded to analyze what the phrase "unoccupied lands" meant under the territorial laws as developed under the constitutional structure that required the Congress to dispose of the territories and create new States. *See* Property Clause, Art IV, Sec. 3, Cl. 2. "To suppose that the words of the treaty intended

to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view." *Id.* at 508. This analysis was a deliberate and correct application of the new land policy built into the structure of the Constitution and a deliberate application of the Equal Footing Doctrine as evidenced by the cite to *Pollard v. Hagan*, 3 How. 212 (1845). *Id.* at 511-512.

Just a year after the decision in *Ward v. Race Horse*, this Court allowed the United States Department of Justice in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1897) to experiment on how to overcome *Pollard's Lessee* and the Equal Footing Doctrine in the Territory of New Mexico. As fully explained to this Court in the merits *amici* brief filed by CERF in *Sturgeon v. Frost II*, Docket No. 17-949, which attached the Federal Irrigation Water Rights memorandum as an appendix, the Department of Justice claimed full title ownership to the land and water in perpetuity against the future State of New Mexico exactly as disallowed by this Court in *Ward v. Race Horse*. 163 U.S. at 511-512.

The first sentence of the federal memorandum – "[t]he United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West" – set the stage. The United States claimed all of unappropriated waters of the Rio Grande, even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis, the United States also had to claim the Rio Grande was non-navigable. The federal memorandum attempts to

explain how the United States can use either argument, navigable or non-navigable, to gain the same results on federal reserved rights. The purported reason is stated just before the quote from the Rio Grande dam case on the third page: "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law." Not long after federal preemption was created on land, the DOJ thus manipulates it to create the federal reserved rights doctrine on water using an identical legal argument linked to the Indian treaties as federal statutes under federal plenary authority as decided in *Kagama*. *See United States v. Winans*, 198 U.S. 371 (1906). This was quickly followed by the claim that there was implied reservation of water when an Indian reservation was created that could displace state conferred private property water rights. *See Winters v. United States*, 207 U.S. 564 (1908).

Amici aver that, if this Court interprets the territorial power of the Congress/United States as-written in the Constitution and as-applied in *Ward v. Race Horse*, then the rights reserved to the Indians in the Indian treaty terminate at statehood to prevent the general federal territorial war powers from interfering with state sovereignty and local governance. If, on the other hand, this Court accepts the Department of Justice's view that all Indian treaties represent full reserved rights of the United States held on behalf of the Indian tribes under extra-constitutional and direct war power authority preserved from the 1871 Indian policy, then the Indian treaties completely preempt all state functions and authority before and after statehood. Under this second position, the Department of Justice does not abrogate state sovereignty and

treats a State no different than an organized territory, except in name, and thus subject to the plenary authority of Congress and the Executive.

There cannot be plenary authority over the Indian tribes in the national government without supplanting state sovereignty. Just as Ed Kneedler argued in *Sturgeon II*, there is no limit on federal jurisdiction or authority when the federal government is acting for Indian tribes if it has plenary authority to reserve any federal interests at any time either by secretarial order, regulation or court action asserting a new federally-protected interest, like the treaty rights in *Mille Lacs* that had laid dormant for 80 years. Amici do not in any way implicate Indian tribes for this characterization of federal power. While the Department of Justice has not expressly claimed the power to terminate State authority, it has chipped away state authority and jurisdiction case-by-case by claiming that this asserted power to protect the Indian tribes is in the national interest and allegedly benign in its effects on the States and the liberty interests of the People.

II. INDIAN TREATY RIGHTS ARE IRRECONCILABLE WITH STATE SOVEREIGNTY OVER ITS NATURAL RESOURCES

A. The *Mille Lacs* Case is an Anomaly in Indian Law.

The Department of Justice has been fully aware that it has been exercising the full war powers preserved in the 1871 Indian policy against the States as explained in the first section of this brief. It has

intentionally not explained to the Court the basis of federal authority underlying the federal reserved rights doctrine. This was particularly true in the way the Department of Justice briefed the Mille Lacs treaty case. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

It was in the *Mille Lacs* case that the Department of Justice convinced a majority of Justices on this Court that State authority over their natural resources was not impaired or preempted when the state agency was required to enforce federal Indian treaty interests. *Mille Lacs* at 204-205. In the split of five justices to four, Justice O'Connor, writing the majority opinion, actually found that enforcing the federal reserved rights from the Indian treaties entered before statehood did not impair state sovereignty repudiating the earlier decision in *Ward v. Race Horse*. In reality, Justice O'Connor applied the second position discussed above that the federal reserved rights doctrine created from the plenary powers from the 1871 Indian policy and *Worcester v. Georgia* is the dominant federal law and has no limitations. She adopted the argument of the Department of Justice almost exactly as it had been briefed starting with the premise that Indian treaties are to be liberally interpreted in favor of the Indians.

Interpreting the Indian treaties as though the primary intent of the United States when making the treaty was actually protecting the Indian interests is a brilliant argument because it displaces any argument that constitutional structural concerns should be and were the primary concern of the United States when the treaties were negotiated and ratified. As Justice Rehnquist correctly notes in his dissent, this turns the whole question of whether the Indian treaties were

intended to end at statehood completely upside down. *Mille Lacs* at 215. The Indian trust relationship is the dominant extra-constitutional national interest just as the *Worcester* ruling allowed. Justice O'Connor was not usually taken in by the federal manipulations but in Footnote 5 she actually addresses the dissent and chides the Chief Justice for his concerns. *Mille Lacs* at 205.

The Chief Justice also points out other federal manipulations in his dissent by quoting provisions of the various Chippewa treaties to demonstrate their deliberately temporary nature. *Mille Lacs* at 208-210, 219-220. As Chief Justice Rehnquist rightly determines, none of the provisions when written were intended to survive after statehood. Justice Thomas added in dissent how potentially disastrous the *Mille Lacs* decision may be to fundamental principles of federalism. *Mille Lacs* at 221. Even amici CERA in the *Mille Lacs* case did not want to believe that federal Indian policy, which appeared to offer remedy to correct how badly the Chippewa Indian tribes had been treated as the country was settled, was incompatible with state sovereignty. As predicted by Justice Thomas, however, the *Mille Lacs* decision had the effect of curtailing Minnesota's sovereign regulatory authority over its natural resources and has caused other repercussions for federalism too.

The *Mille Lacs* decision appears to be the last decision that the majority of Justices accepted the federal government's arguments without looking behind its intent in making such arguments. Just two years later, the majority openly questioned the intent of federal Indian policy. The major turn occurred in 2001, with the opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001) when a tribal court asserted the right to

entertain a suit from a tribal member accused of off-reservation poaching against the state enforcement officer for civil rights damages. Even if the Court disagrees that *Mille Lacs* can be characterized as overruling *Ward v. Race Horse*, *Nevada v. Hicks* must, in the least, be considered as reconsidering everything decided in *Mille Lacs*. *Nevada v. Hicks* followed *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) basing its analysis on *Montana v. United States*, 450 U.S. 544 (1981) a case not even mentioned in the *Mille Lacs* opinion. *Nevada v. Hicks* required the Court to examine how tribal sovereignty was threatening to dominate state sovereignty and how the Department of Justice was arguing for that conclusion.

Just four years later, this Court heard City of *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) where the Oneida Nation argued that, as a matter of federal law, it could assert its old treaty rights and unify the rights with reacquired fee title to reestablish tribal sovereignty as if it had never been lost to the State of New York. Justice Ginsburg wrote an opinion explaining why the Court would not allow the unification theory but then instructed the Oneida Nation to use the fee to trust process to displace state sovereignty through the asserted reserved rights of the United States. *Sherrill* at 221. Then came *Carcieri v. Salazar*, 555 U.S. 379 (2009) and the issues of a State-recognized Indian tribe and the deliberate misinterpretation of the intent of Congress in the passing of the Indian Reorganization Act of 1934. This Court attempted to interpret the Indian Reorganization Act as Congress had intended in 1934, which triggered outright opposition from the Department of the Interior and the Department of Justice as to the interpretation of Indian under the act.

See Opinion of the Solicitor M 37029. After *Carcieri v. Salazar*, the Court could no longer ignore that the Department of Justice had its own agenda with federal Indian policy.

Ironically, the very first issue discussed in *Mille Lacs* was the one most manipulated by the Department of Justice. The question of whether the President could end the treaty rights was the ultimate red herring in enforcing a federal Indian policy that is actually based on war powers, as though Indian are still belligerents of war. If the real source of the perpetual treaty rights was revealed, there would be no question that the President as Commander in Chief held the ultimate right to end the treaty rights. But this is where the cleverness of the Department of Justice agenda proves its direct connection to the Nixon Indian policy that CERF usually discusses in its amici briefs to this Court. Richard Nixon found out how the federal reserved rights doctrine really works from William H. Veeder, who was a career lawyer for the Department of Justice. Together, they massively expanded the Department of Justice agenda. But, for some reason that amici have not determined why all of the Nixon Indian policy memoranda omit the Removal Act of 1830 from their history summaries. The Department of Justice has obfuscated the reasons and history of the Removal Act, as it did in *Mille Lacs*, but does not try to omit it from the discussion. Amici raise this because it has become such an odd fact that amici question whether we are all missing something important.

Amici have not spent much time analyzing the *Mille Lacs* decision in-depth because it is undeniably based on federal plenary power and the federal reserved rights doctrine being placed above the federalism structure of the Constitution, as explained in

the first section of this brief. There is enough case law today applying the federal reserved rights doctrine that simply overruling or distinguishing one case will have very little impact. It is the overall choice of whether the law is going to support the Department of Justice position or is going to continue the recent case line and return to the constitutional structure that should control.

B. The Court's Federalism Analysis in *Murphy* Applies to this Case.

In *Murphy v. NCAA*, the majority struck down as unconstitutional provisions in the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §3701 et seq. that was passed 26 years ago and purported to allow the Congress to prohibit state legislatures from legalizing off site sports betting within respective States. The reasoning of the majority was taken from the federalism argument adopted by the Rehnquist Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The *Murphy* Court changed the prohibition against compelling or coercing a state to administer a federal program into a more defined line—Congress has no power to commandeer any state legislative function that it cannot federally preempt using a direct authority granted to it under the federal Constitution. *Murphy* at 1476. "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." 138 S. Ct. at 1475. Justice Alito spent

considerable effort defining appropriate federal preemption in the majority opinion, explaining:

> "The legislative powers granted to Congress are sizable but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."

138 S. Ct. at 1476.

The anticommandeering doctrine has the potential to be more enforceable than the old equal footing doctrine. The equal footing doctrine relied on the requirement to dispose of the territory and create new states in the Property Clause, Art. IV, Sec. 3, Cl. 2. The United States was allowed to retain territorial land only on a temporary basis in a case that determined states owned the bed and banks of a navigable waterway. *See Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The main concept was that the federal government could exercise plenary power over a territory but that, upon the formal creation of the territory by Congress, certain powers and ownership over the water would vest in the future state. *Pollard* at 221. This insured that all States would be admitted on equal footing with the existing states. Before the

Civil War Amendments and the end of slavery, this was the only way to enforce the Framers' views that all people are equal before the law. When this Court acquiesced to Congress having continuing plenary authority over Indians, it effectively nullified the equal footing doctrine because Congress no longer had to dispose of any federal territory; it could retain all federal territory indefinitely. This completely contradicts the bedrock principle "that each State is entitled to the sovereignty and jurisdiction over all territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845).

The main principal of the anticommandeering doctrine is that neither the Congress nor any part of the national government has the authority to require a State or State official to act as an agent of the United States to enforce a federal law. *Murphy*, 138 S. Ct. at 1476-1477. As stated in the Federal Irrigation Water Rights memorandum, the plenary authority flips the primary ownership of the water from state to federal and converts the state laws on acquiring a water right into laws passed as agents of the United States to comport to federal laws. The same result occurs when state officials are required to enforce Indian treaty interests that are reserved federal rights. The state officials become agents of the federal government enforcing the federal interests as preemptive rights that can actually displace their state authority. This has occurred with respect to natural resource management of Mille Lacs Lake and other ceded lands after the *Mille Lacs* decision was issued.

The State of Minnesota stipulated to an agreement with protocols for the enforcement of the *Mille Lacs* decision that recognize only the Department of Justice, the seven bands of Chippewa and the

Minnesota Department of Natural Resources as the managers of Mille Lacs Lake. *See* Stipulation, Civil No. 3-94-1226 (D. Minn. 1996), available at https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/stipulation.pdf. The Minnesota Department of Natural Resources may collect data and may provide input to fish management within the ceded territory; however, the Band specifically disagreed that the State has authority to resolve disputes regarding the harvestable amount of Walleye. *Id.* at Ex. D-1, Protocol #1: Minnesota 1837 Ceded Territories Fisheries Committee), available at http://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/exhibit_d1.pdf. No non-Band members have input or right to be heard on the 1837 Ceded Territories Fisheries Commission created for fish management and other state resource decisions affecting the lake either. Currently, only Band members can actually take a Walleye from the lake. Non-Band members cannot take any Walleye and face serious fines for doing so, as enforced by the Minnesota Department of Natural Resources, tribal game wardens and federal officials. Since the ***Mille Lacs*** decision, the Minnesota Department of Natural Resources has thus been an agent for the federal interests. This Court may have thought it was only allowing limited usufructuary rights to be restored to the Bands, but the result has been federal commandeering of the State's management of the lake and other ceded lands, which now threatens to destroy what was once the best Walleye fishery in Minnesota.

III. APPLYING FEDERALISM IN THIS CASE

Amici have spent the majority of this brief discussing the legal realities behind the federal reserved rights doctrine. In application to this case and Petitioner Herrera's requested relief, the issue is much simpler. If this Court meant what it said in *Murphy v. NCAA*, then it should uphold the application of *Crow Tribe v. Repsis*, which retains the validity of *Ward v. Race Horse* against Herrera. Agreeing with Herrera's argument would directly contradict the Court's holding in *Murphy v. NCAA* and the fundamental concept that the constitutional structure includes and protects federalism. If this Court agrees with Wyoming, and amici believe case law requires the Court to do so, then amici respectfully request the Court affirmatively state something to restore the validity of *Ward v. Race Horse* in the majority opinion.

Amici recognize it is more complicated to discuss the question whether the national forest land is occupied or unoccupied. Like the discussion of the presidential order in *Mille Lacs*, however, this issue is a red herring because the Department of Justice can argue the land status any way it wants to under the plenary authority and can always conclude that federal authority preempts state authority just as it has done on water issues. Under the federal public land laws, the declaration of the national forest closes the lands to settlement because the lands become reserved for use as a national forest, which is an occupation of those lands for a particular purpose. Federal public land laws can be, and have been, manipulated by the overriding plenary authority the Department of Justice so claims the federal government has over such lands. Amici hope the Court is truly seeing what the federal reserved

rights that include the Indian treaty rights have done, and may continue to do, to curtail the constitutional structure and federalism.

CONCLUSION

Amici respectfully request the Court uphold the decision of the Tenth Circuit Court of Appeals affirming Wyoming's conviction of Herrera.

Respectfully submitted,

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